UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

BAUMANN & SONS BUSES, INC.

Case No.: **34-CA-9847**
34-CA-10089
and **34-CA-10112**
34-CA-10150
34-CA-10304

LOCAL 100, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

Patrick Daly, Esq., **for the General Counsel.**
John K. Diviney, Esq., **of Portnoy, Messinger, Pearl & Associates, Inc. for the Respondent.**
Elizabeth Pilecki, Esq., **for the Union.**

DECISION

Statement of the Case

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on March 24, 25, 26 and September 16, and 17, 2003 in New York, New York.

Based upon a series of unfair labor practice charges filed on September 24, 2001 through July 23, 2002, a Consolidated Complaint and Notice of Hearing issued on February 27, 2003, alleging various violations of Section 8(a)(1), (3) and (5) of the Act.[1]

Based upon the entire record herein, including my observation of the witnesses, and briefs filed by Counsel for the General Counsel and Counsel for Respondent, I make the following findings of fact and conclusions of law.

Findings of Fact

Respondent is a New York Corporation with an office and place of business located in New Canaan, Connecticut, where it is engaged in the business of providing school bus transportation services. During the twelve month period ending December 31, 2001, Respondent, in conducting its business operations, derived gross revenues in excess of $250,000. During this same period, Respondent purchased and received at its New Canaan facility, goods valued in excess of $50,000, directly from points outside the State of Connecticut. It is admitted, and I find that Respondent is an employer, engaged in commerce within the

[1] Several amendments were made during the course of this trial.

meaning of 2(2), (6), and (7) of the Act.

It is also admitted, and I find the Union is a labor organization within the meaning of Section 2 (5) of the Act.

Background & Successorship

Respondent is engaged in the business of providing school bus services to public and private schools in New York State and Connecticut, including one in New Canaan, Connecticut, the facility involved in this proceeding. This facility, which is comprised of two trailers, the drivers' trailer and the Office trailer are located adjacent to a parking area on the property of the New Canaan High School. The school buses used by Respondent to provide school bus service to New Canaan are parked at the high school parking lot when not in service. One of the trailers provides space for the dispatcher, which is located near the entry to that trailer, as well as an office for the facility manager, Debbie Casavecchia, an admitted supervisor within the meaning of the Act. The other trailer is used by the school bus drivers employed by Respondent at that facility, herein called the "drivers" trailer.

Successorship

Prior to June 2001, school bus service was provided to the Town of New Canaan by the Suburban Bus Company. [2] As part of this agreement, Suburban provided school bus service to the Country School, a private school in New Canaan, CT, in addition to the New Canaan public schools. [3] During the time that Suburban provided this service, the Union represented all of its full-time and regular part-time operating employees at its New Canaan facility, including drivers, monitors, maintenance employees, utility employees and cleaner-fuelers and had a collective-bargaining agreement with Suburban covering those employees, with a term of more than four years, and with an expiration date of June 30, 2002, herein referred to as the "Suburban contract."

In June 2001, Respondent was awarded a contract by the New Canaan Board of Education, as the successful bidder to provide the school bus service then being provided by Suburban.

Following an offer by Respondent of a bonus of $1000 to those Suburban employees who accepted employment with it for the coming school year, 2001-2002, sometime in June 2001, the Union requested that Respondent meet with it to negotiate a collective-bargaining agreement with respect to the Unit. In this regard, following the Union's request to meet and bargain, Respondent, by it's Labor Consultant and chief spokesperson, Murray Portnoy, and other representatives of Respondent, including Jimmy Santos, an attorney with the law firm with which Portnoy was associated, met with George Jennings, the Union's vice president for private lines, Susan Jennings, the Union's attorney and other Union representatives on three occasions in the summer of 2001.

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[2] During Suburban's tenure, there was only a single trailer, which provided the same functions as do the two trailers of Respondent, one being an office trailer, and the other a driver's trailer.

[3] Although Respondent has a separate contract with the Country School to provide school bus service, it provides service to both the Country School and the New Canaan public schools from a single integrated operation at its New Canaan facility.

In the first of theses meetings, held on June 27, 2001, Portnoy proposed that the Suburban contract apply to Respondent's New Canaan facility. However, the Union countered by requesting that Respondent apply the terms of a collective-bargaining agreement the parties had with respect to a bargaining unit that the Union represented at another of Respondent's facilities, in Yorktown, NY, which the Union considered to have more favorable provisions than the Suburban contact. No claim was made by Portnoy at this meeting that the Union did not represent a majority of Respondent's employees at its New Canaan facility.

At the second bargaining session, held on July 17, 2001, the parties agreed that Respondent was a successor employer with respect to the Unit employees at Respondent's New Canaan facility. However, a disagreement arose between Portnoy and Union representative Jennik as to the meaning and legal consequences of their agreement. Jennik told Portnoy that Respondent, as the lawful successor to Suburban, had an obligation to bargain in good faith with the Union regarding the terms and conditions of employment of Unit employees at Respondent's New Canaan facility. When Jennik then proposed that the terms of the contract between the parties at Respondent's Yorktown facility be used as a basis for negotiating a contract for the New Canaan facility, Portnoy responded that, as the lawful successor, Respondent was able, and indeed obligated, to apply the remaining year of the Suburban contract to those employees under the U.S. Supreme Court decision in *National Labor Relations Board v. Burns International Security Services, Inc.* 406 U.S. 27 (1987).

The next meeting in mid-July, was a very short meeting. At that meeting the Union again proposed that a contract for the New Canaan facility mirror the terms and conditions in Respondent's contract with the Union at its Yorktown, NY facility. However, Portnoy said that Respondent wanted to apply the Suburban contract to its New Canaan employees. In response, Jennik stated that Respondent had a duty to negotiate. Portnoy, responded by saying, "so you don't want us to adopt your Suburban contract?" to which Jennik reiterated that the Union wanted Respondent to negotiate with it. Hearing that, Portnoy said, "then there's nothing more to talk about" and the meeting ended.

In a letter Portnoy sent to Jennings dated July 17, 2001, he made "perfectly clear" that Respondent would "begin servicing the New Canaan school district on or about September 1, 2001." After acknowledging that the Union represented a majority of Suburban's employees, Portnoy also stated that Respondent was prepared to honor the Suburban contract until its expiration date of June 30, 2002. Although Portnoy also hypothesized a situation in which Respondent would have no obligation to the Union if it did not represent a majority of Respondent's employees as of the date it commenced operations in New Canaan, i.e., "or about September 1, 2001," at no time did Portnoy or any other representative of Respondent contend that the Union did not represent a majority. Indeed, Respondent never raised the issue of the Union's majority status even in a speculative manner, let alone challenge it thereafter.

Jennik responded to Portnoy's July 17 letter by letter dated July 24, 2001. In it, Jennik recapped the July 17th negotiations and confirmed Respondent's demand to apply the Suburban contract to the Unit employees, and the Union's counter-proposal of applying the terms of its existing contract with Respondent at its Yorktown facility. [4] In that letter, Jennik advised Portnoy that the Union "remained ready to negotiate a contract and was prepared to meet and discuss proposals. She also reiterated the Union's bargaining position, that the Yorktown

[4] Although Jennik's July 24 letter did not specify which "Baumann contract" she was referring to, her testimony regarding the negotiations of July 17 makes clear that it was Respondent's Yorktown facility.

contract should provide the basis for such negotiations, to which the Union was prepared to consider Respondent's proposals to modify the terms of the Yorktown contract as it would apply to New Canaan.

In the third and final bargaining session between Respondent and the Union on August 29, 2001, Respondent presented the Union with a contract proposal in the form of a chart comparing provisions of the Suburban contract with proposed provisions of that contract applicable to New Canaan. Jennings told Portnoy that the Union would agree to Respondent's proposal for one-year (the balance of the Suburban contract term), provided that the parties could agree to modify two provisions regarding: (a) the initial rate of pay and (b) the clarification of a provision regarding a three-hour guarantee. When Portnoy responded that Respondent wanted a five-year agreement, the negotiations came to an end. However, before the meeting ended, Portnoy advised the Union that Respondent would be implementing the terms and conditions as set forth in the chart presented at that meeting when it commenced operations at the New Canaan facility on the following Monday, September 4, 2001.

On September 4, the day its' school bus service began, Respondent applied the Suburban contract terms, as proposed on August 29.

During the first week that Respondent provided school bus service to the Board of Education, it was able to provide field service to all of the New Canaan schools as required by its contract with the Board of Education, using drivers employed by it at its New Canaan facility, and represented by the Union.

In this regard, during that first week, the Union represented a majority of the employees employed by Respondent to provide those services. Respondent employed 29 drivers, of which 20 were part of the unit represented by the Union during the time that Suburban, the predecessor to Respondent, provided school bus services to the Town of New Canaan.

In *National Labor Relations Board v. Burns International Security Services,* 406 U.S. 272 (1972) the Supreme Court first announced a test to decide whether an employer is obligated to bargain with a union that had represented the employees of its predecessor. An employer is a *Burns* successor with an obligation to recognize and bargain with an incumbent union when there is "substantial continuity" between the predecessor and successor enterprises and when a majority of the employees of the new employer in an appropriate unit had been formerly employed by the predecessor. *Burns*, 406 U. S. at 280-281. The Court upheld the proposition that a mere change of employers or of ownership of an enterprise did not mean that the new employer had no obligation to bargain with its predecessor's employees. In the circumstances of that case, and where "the bargaining unit remained unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent," the court found a duty to bargain on the part of the new employer.

The *Burns* doctrine was refined in *Fall River Dyeing and Finishing Corp. v. National Labor Relations Board,* 482 U.S. 27, 43-45, 125 LRRM 2441 (1987), with the Court's holding "that a successor's obligation to bargain is not limited to a situation where the union in question has been recently elected. Where…the union has a rebuttable presumption of majority status, this status continues despite the change in employers and the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by the predecessor." [footnote omitted]

The Court went on to discuss the appropriate approach to determining whether an acquiring company is in fact a successor to the old company. More specifically, where a

Section 8(a)(5) violation is alleged in the context of one employer assuming the operations of a predecessor employer, the General Counsel must demonstrate both the majority status or constructive majority status of the union in an appropriate unit, and a "substantial continuity" between the employing enterprises. *Fall River Dyeing,* supra, 482 U.S. at 43. As stated by the Board in *Sierra Realty Corp.,* 317 NLRB 832, 835 (1995), involving the takeover of a cleaning operation,

> The threshold test developed by the Board and approved by the Supreme Court in *Burns* and *Fall River Dyeing* for determining successorship is: (1) whether a majority of the new employer's work force in an appropriate unit are former employees of the predecessor employer; and (2) whether the new employer conducts essentially the same business as the predecessor employer. (footnote citations omitted).

The Court in *Fall River Dyeing,* supra, 482 U.S. at 43, focused on the following criteria in determining whether there exists the requisite "substantial continuity," namely,

> …whether the business of both employers is essentially the same, whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisor, and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

See also *Staten Island Hotel*, 318 NLRB 850, 853 (1995), enfd. 101 F.3d 858, 153 LRRM 3067 (2d. Cir. 1996).

Once there is a substantial continuity of the employing enterprise, a successor's bargaining obligation is established when the predecessor employees constitute a majority of the new employer's workforce in a "substantial and representative complement." *Fall River Dyeing,* supra, 482 U.S. at 47. In determining whether a new employer has hired a substantial and representative complement, the Board and the courts examine whether the employer has substantially filled the unit job classifications designated for the operation, whether the operation was in substantially normal production, the size of the complement on the date of normal production, the time expected to elapse before a substantially larger complement would be at work, and the relative certainty of the expected expansion. *Id.* at 49; *Royal Vending Services*, 275 NLRB 1222, 1229 (19850, citing *Premium Foods v. National Labor Relations Board,* 709 F. 2d 623, 628 (9th Cir.1983). See also, *Van Lear Equipment, Inc.,* 336 NLRB 1059 (2001).

All parties agree that there is both an "essential continuity" between Respondent's operations at its New Canaan facility and that previously operated at the facility by Suburban just prior to Respondent taking over in June 2001. Nor is there any dispute that Respondent conducts essentially the same, if not a mirror-image, business as the predecessor employer, Suburban. Although Respondent refused to concede in this proceeding that, which it did even before assuming operational control of the New Canaan facility, the Union represented a majority of its employees in an appropriate unit, there is no doubt of that fact as well.

Thus, although Respondent denied in its Answer to the Consolidated Complaint, that the Union was the exclusive bargaining representative of the employees in the appropriate Unit set forth, that very same Unit description, taken from the Union's contract with Respondent's predecessor, Suburban, was incorporated verbatim into Article 1 of the terms and conditions

that it implemented with respect to that Unit on August 29, 2001, effective September 4, 2001, the first day it operated the New Canaan facility. On that latter date, Respondent was well aware that a majority of the employees in that Unit, had formerly been represented by the Union. Respondent was the lawful successor to Suburban as the employer of the Unit of employees performing the same work, at the same facility under essentially the same circumstances as did employees while employed by Suburban, immediately prior to Respondent assuming operational control of the New Canaan facility.

Indeed, Respondent considered itself to be the lawful successor to Suburban almost from the day that it became the successful bidder for the contract to provide school bus service to the Town of New Canaan in about mid-June 2001. In this regard, Respondent agreed to, and in fact did, meet with the Union during the summer of 2001, for the purpose of negotiating a successor contract. In fact, Respondent by it's legal representative, Portnoy as labor relations consultant, referred to itself as the successor to Suburban, both in those negotiations, and in correspondence between it and the Union while those negotiations were on-going. By engaging in negotiations with the Union at its request for the purpose of reaching agreement on a successor agreement, Respondent tacitly if not explicitly, recognized the Union as the exclusive representative of the Unit for the purposes of collective-bargaining.

In any event, Respondent clearly recognized the Union as the exclusive representative of its employees for the purpose of collective-bargaining on September 4, 2001, when it implemented terms and conditions of employment with respect to the Unit, at a time that it knew that the Union represented a majority, as demonstrated by GCX-40. See, *Nantucket Fish Company,* 309 NLRB 794 (1992), wherein the Board stated that "[a] commitment [by an employer] to enter into negotiations with the union is also implicit recognition of the union." In that case the Board stated that it "will find that an employer has agreed to recognize the union on proof of majority status and the union's status has been demonstrated." In the instant case, Respondent's action in entering into negotiations with the Union in the summer of 2001, and especially its implementation of its contract proposal on September 4, 2001, at a time that it had to know, and indeed, knew that the Union represented a majority of its employees, constituted a voluntary recognition given to the Union as the exclusive bargaining representative of employees in the Unit on that date, if not before. Indeed, as already noted, Respondent never made a claim to the Union that it did not represent a majority of its employees, and in fact, ultimately negotiated a contract with the Union on August 2, 2002.

Although Respondent made some amorphous claims that its employees as of that date did not constitute a "representative complement" of the Unit, it failed to provide any evidence to support that contention. In contrast, Respondent representative Jim Poisella testified that during the first week that Respondent provided school bus service to the Board of Education, it was able to provide such service to all of the New Canaan schools as required by its contract with the Board of Education, using drivers employed by it at its New Canaan facility. During that same time, the only complaints that Respondent received from the Board of Education related to issues that are typical of any start-up, such as the timeliness of its buses, and missed stop due either to such training issues as drivers not being totally familiar to their routes, or a lack of information from the Board of Education regarding new students or deletions that remained on the list of students. Clearly, in the absence of other evidence, Respondent's workforce clearly constituted a "representative complement" of the appropriate Unit. See, *Inn Credible Caterers, Ltd.,* 333 NLRB 898 (2001) and cases cited therein.

Accordingly, I conclude that Respondent is a *Burns* successor.

Refusal to Bargain

(1) Requests for Information

During the course of the August 29th negotiations, Union Vice-president Jennings asked Portnoy for a copy of the Town of New Canaan bid specifications upon which Respondent made its bid for the New Canaan contract. At the time, Portnoy made no claim that he did not understand the Union's request. Indeed, he advised the Union that he would provide that document. However, notwithstanding that representation, Portnoy failed to provide any such bid specifications for more than three months. Thereafter, during the course of the investigation of Case No. 34-CA-9847, Respondent's counsel, Jimmy Santos, provided two pages of that bid specification, not to the Union, but to a Board Agent under cover of a letter dated December 7, 2001. Those bid specifications were later sent to Jennik. Notwithstanding Respondent's two-page submission to the Union, dated December 7, it failed to comply with the request for information made by the Union in the August 29, 2001 bargaining session. Instead, the two-page document provided by Respondent on December 7 was only those pages that it deemed to be "the relevant portions" of the information requested by the Union. Indeed, as the notation on the bottom right hand corner of the first of those two pages makes clear, that specification comprised of at least 29 pages and not just the two provided. Prior to receiving those two pages, the Union had not seen them, or any other part of the bid specifications. Thereafter, Respondent failed and refused to provide a complete copy of the bid specifications as requested.

(2) Respondent's Bid Submission

Shortly after receipt of the two pages referred to above, the Union, by Jennik, in a letter to Portnoy, dated December 20, 2001, requested that Respondent provide it with a copy of "the complete description of [Respondent's proposed] driver compensation package, that Respondent was required to submit to the Town of New Canaan as part of its bid, as required by Paragraph 8.2.13 of the bid specification. As set forth in Jennik's letter, the information requested included:

> A complete description of the proposer's driver compensation package and negotiations history must be submitted with the Proposal. This must include wage rates and any of the following: Heath benefits, vacation pay, guaranteed minimum daily hours, incentive or other bonuses and current hourly rates of pay. Agreements and/or employee handbooks must also be provided. The proposer assumes all responsibility and/or liability that may arise in connection with all labor agreements.

In an apparent misunderstanding of Respondent's obligation to provide information that is relevant and necessary for the Union to function as the exclusive bargaining representative of the Unit, Portnoy responded to Jennik's December 20th request by letter dated January 2, 2002, in which he stated that he knew of no grievance pending between the Union and Respondent, and therefore did not understand the information request made by Jennik. Thereafter, Respondent failed and refused to provide the information contained in Jennik's letter dated December 20, 2001.

I conclude that notwithstanding the fact that such information was necessary and relevant to the Union's role as the recognized bargaining representative, Respondent failed and refused to provide that information to the Union. In *Orthodox Jewish Home for the Aged,* 314

NLRB 1006 (1994), the Board held that the employer's refusal to furnish relevant information to the union prevented the parties from reaching genuine impasse permitting it to implement its contract proposal. See also, *Intermountain Rural Electric Association,* 305 NLRB 783 (1991).

Accordingly, I conclude Respondent's failure to provide the information described above, is a violation of Section 8(a)(1) and (5) of the Act.

The Unilateral Changes

(1) The October 2001 Wage Increase

By memo to employees dated September 17, 2001, Ronald Baumann advised employees that the hourly rate of pay for drivers and existing trainees who had a commercial driver's license [CDL] would be increased from $14.00 per hour to $15.00 per hour, effective October 1, 2001. Portnoy advised Jennings of Respondent's decision to grant that wage increase by telefax that same day, but without any prior notice to the Union or opportunity to bargain with regard to that wage increase.

(2) The Safety Bonuses

During the time that Suburban provided bus service to the Town of New Canaan, drivers who had no accidents during a school year were paid a safety bonus of $500 at the end of the school year in June; in the event they only had a minor accident, they were paid a safety bonus of $250. Notwithstanding this long standing practice, of which Respondent was aware because its terminal manager Casavecchia was employed at the New Canaan facility for twenty years, and was Respondent's dispatcher while employed by Suburban, a position Respondent considers to be managerial, Respondent failed to pay such bonuses at the end of the school year, starting in June of 2002.

(3) Posting and Assigning Summer Work

During Suburban's tenure, all summer work that was available was posted by Respondent at least two to three weeks prior to the end of the school year. During the time that Respondent's predecessors were providing bus service to New Canaan, those postings were done in the single trailer used both for the office and drivers. When Respondent took over the New Canaan facility, notices to drivers regarding available summer work were posted in the drivers' trailer. These postings required drivers to sign up if they were interested. Thereafter, it was Respondent's unalterable practice, consistent with that of its predecessors, that summer runs were assigned to the most senior driver who had signed up for any given run. In the summer of 2002, in contrast to the practice described above, Respondent posted summer runs only 10 days before the end of the school year, rather the prior two to three week period.

(4) Charter Runs

In addition to regular runs involving the transportation of students to and from school, Suburban [and Laidlaw before it] also had charter runs, which operated in the evenings and on weekends. These charters were normally posted by Suburban [and Laidlaw] about two weeks in advance of when they were to operate. These postings contained such information as the date of the charters, the name of the organization that asked for the charter bus, the number of buses to be used, the return time, and the approximate amount of pay for the charter. Drivers signed these charter postings as they did for summer runs, and charter runs were assigned to the driver with the greatest seniority from among those who signed up. If a specific driver was

requested by name by the organization seeking the charter, that driver would normally be assigned the charter.

Once Respondent took over operations, it did not initially post the charters. Later, although posted, they were not posted in advance as they had previously been by Suburban [and Laidlaw]. Instead, they were posted shortly before the date of the charter, and in some instances, the day of the charter or the day before. Those postings contained less information than the previous ones as they didn't contain the return time of the charter. Some charters were not posted at all, as evidenced by the fact that Respondent's daily drive sheet maintained at the New Canaan facility showed charters leaving that facility that had not been posted.

During the time of the Suburban operations, drivers with regular weekday runs could also be assigned charters. In addition, during that time, if a charter overlapped with a scheduled run of a driver who successfully bid on it, that driver could opt to take the charter and his/her regular run would be covered by a spare driver. However, starting sometime during the 2001-02 school year, and after Respondent took over operations at New Canaan, Casavecchia refused to permit drivers with regular runs to bid on charters if they started or finished during a driver's regular run, thereby effectively barring such drivers from potentially more lucrative assignments. Many charters were not even posted by Casavecchia who assigned them as she saw fit.

(5) Late Runs and Non-Revenue Runs

There are four late runs at the end of the school day: north, south, east, and west. These runs were used to transport students who left school later than the normal end of the school day. During the last three years of Suburban's tenure, drivers were paid a flat rate equal to one and one half their hourly rate of pay for late runs. In about September 2001, Casavecchia changed this practice by telling drivers that they would only be paid one hour's pay for late runs. In addition, in the event that there were no students for a given late run, drivers were not paid anything, even though they drove to their assigned schools seeking students to be driven home.

During Suburban's tenure, non-revenue work such as transporting of buses had a minimum amount of pay, or were paid only for the actual time that they drove, whichever was greater. After Respondent took over operations, drivers were paid only for the time that they drove, even if the resultant pay was less than the minimum pay previously paid for non-revenue runs.

As discussed in detail above, Respondent unilaterally changed the certain terms and conditions of employment of Unit employees, without giving the Union notice in advance of those changes, and an opportunity to bargain with respect to them, before implementing them. For many of these changes, little more needs to be said, as Respondent offered no testimony to rebut the General Counsel's prima facie evidence of such violation. Those changes include those relating to the posting and scheduling of charter runs, minimum payments for non-revenue and late runs, safety bonuses, and the scheduling of summer runs. Some discussion is also appropriate regarding the hourly rate of pay, effective October 1, 2001.

Unilateral changes by an employer during the course of a collective-bargaining relationship concerning matters that are mandatory subjects of bargaining are normally considered *per se* unlawful refusals to bargain. *National Labor Relations Board v. Zelrich Col.* 344 F.2d 1001 (6th Cir. 1964).

There is no dispute that the changes described above were made by Respondent "during the course of a collective-bargaining relationship" with the Union. Indeed, all of these changes occurred after Respondent recognized the Union as the exclusive collective-bargaining representative of the unit, changes which Respondent not only admittedly made as alleged, but also without first giving the Union notice of its intent to make such changes, or an opportunity to bargain with respect to them. Although Respondent also denied that these changes were mandatory subjects of bargaining, there is no question that they are. All such changes involve wages, hours and other terms and conditions of employment of the Unit, including changes in employee wage rates and payments of wages, and employee work schedules. [5]

See, *Parent and Friend of the Specialized Living Center,* 286 NLRB 511 (1987) and *Acme Die Casting,* 315 NLRB 202, (1994); (changes in work schedules); *Community Television of Southern California*, 312 NLRB 15 (1993) and *Storer Communications,* 294 NLRB 1056 (1989) (changes in terms and conditions of employment); and *Outboard Marine Corp.* 307 NLRB 1333, (1992) (wage increase).

With regard to the change in the hourly rate of pay, I conclude the above unilateral change to be violative of Section 8(a)(1) and (5). Respondent contended that it was necessary that it implement that increase, in order to be more competitive with regard to the compensation of its workforce. However true that may have been, it did not excuse Respondent's failure to give notice to the Union before implementing that wage increase, and an opportunity to bargain with respect to it before implementing it.

Unlike the previous wage increase to $14.00 per hour that Respondent implemented without giving notice or bargaining with the Union, after it was awarded the contract to provide school bus service, that increase was mandated by the Town of New Canaan as a condition of undertaking that contract. Under such circumstances, Respondent was not required to bargain with the Union regarding that wage increase, as it had no control as to whether that wage increase should be granted. Had it declined, it is likely that Respondent would have been in breech of its contract with the Town of New Canaan and be required to pay damages or provide some other remedy in a legal or administrative proceeding.

In contrast, however desirable it deemed the need to increase employee wages to $15.00 per hour, it was not required to do so to avoid being in breech of its contract with the Town of New Canaan. Instead this was an economic decision that it deemed desirable, and as such was obligated to bargain with the Union before implementing it. Indeed, such unilateral change will be deemed unlawful even when made in good faith. In this regard, the harm done by a unilateral change under such circumstances, justifies a rigorous, per se finding of a violation of Section 8(a)(1) and (5) of the Act. See., *National Labor Relations Board v. McClatchy Newspapers,* 964 F.2d 1153 (D.C. Cir. 1992).

In making the above changes without first giving the Union notice in advance of those changes, and an opportunity to bargain with respect to them, before implementing them, I conclude Respondent violated Section 8(a)(1) & (5) of the Act.

[5] An alleged unilateral change concerning the Union's access to unit employees is discussed below. In this regard, I made a finding of fact, and conclusion of law that Respondent had no control over this change. The New Canaan School District had total control.

Respondent Unlawfully Refused to Bargain

The facts establish from the outset that Respondent refused to bargain in good faith with the Union. Indeed, Respondent's conduct, when viewed in its totality during the period from June 2001 through sometime in mid-August 2002, evidences a clear intent neither to bargain in good faith with the Union nor to reach agreement on a successor agreement with it. As described below, Respondent refused all requests to meet and bargain regarding day-to-day concerns of the terms and conditions of its employees in the spring of 2002, while engaging in conduct to undermine the status of the Union as the recognized collective-bargaining representative amongst its employees.

In this regard, during the summer of 2001, Respondent met with the Union on three occasions for the expressed purpose of reaching a successor agreement with respect to the Unit. To that end, the parties met on three separate occasions during which both agreed that Respondent was the lawful successor to Suburban with respect to the Unit. Unlike Respondent, the Union contended correctly that, as a lawful successor, Respondent's obligation was to negotiate with it in good faith regarding the wages, hours and other terms and conditions of employment with respect to the Unit. In contrast, Respondent contended that, not only could it apply the one-year balance of contract that had existed between Suburban and the Union, it was obligated to do so. At the end of the third such bargaining session on August 29, 2001, in which Respondent did not change its position, it advised the Union that it intended to unilaterally implement the contract proposal it made during that session, effective the following Monday, September 4, 2001 when Respondent assumed operational control of the New Canaan facility. As promised, Respondent implemented its contract proposal on September 4, 2001.

In *American Automatic Sprinkler System,* 323 NLRB 920 (1997), the Board found that the employer had bargained in bad faith in violation of Section 8(a)(1) and (5) of the Act by unilaterally implementing terms and conditions of employment at a time that there was no lawful impasse.

Accordingly, I conclude that by engaging in such conduct, Respondent violated Section 8(a)(1) and (5) of the Act.

Beginning in 2002, Respondent failed to even discuss possible dates to bargain until the latter part of May 2002. In the intervening period of time, Union representative Smith, now deeply involved with the concerns of Unit employees, made several requests that Respondent meet with the Union as the recognized bargaining representative of the Unit. To that end, Smith sent Poisella a letter, dated May 8, 2002, in which he requested that Respondent meet with him and the employee Union committee regarding some day-to-day concerns of the employees as to wages, hours and other terms and conditions of employment, as well as a request that Respondent return to the bargaining table, and requested that a schedule of bargaining sessions be agreed upon. However, Respondent did not respond to those enumerated concerns, and never met with Smith or his employee committee.

Portnoy responded to Smith's letter by letter stating that Smith may not understand the "wage and all other terms and conditions of employment implemented [by Respondent] pursuant to *Burns International,"* at the start of the September, 2001 school year. Portnoy agreed to meet only with respect to that implementation. By letter dated May 31, 2002, Smith again requested that Respondent meet with respect to the suspension of George Bellamy, a driver that had been suspended without a hearing, in accordance with the "the collective-bargaining agreement currently in force" between the parties, a reference to the contract Respondent had unilaterally implemented on September 4, 2001. In refusing to meet regarding

Bellamy's suspension, Poisella advised Smith "that there is no current collective-bargaining agreement between the parties", and requested that he refrain from such claim in the future.

Thereafter, by letter dated June 3, 2002, Jennik the Union's attorney, proposed 8 different dates within an 11 day period in mid-June for continued collective-bargaining negotiations. Nonetheless, Portnoy failed to respond to Jennik's proposal. However, following the issuance of the Consolidated Complaint in the instant matter, negotiations resumed between the parties in August 2002, ultimately leading to their reaching agreement on a collective-bargaining agreement for the New Canaan Unit on or about September 21, 2002. That contract was ratified by the Unit in about October 2002.

It is well settled that an employer is obligated … to meet with the employees' bargaining representative to discuss its grievances and to do so in a sincere effort to resolve them. *Hoffman Air & Filtration Systems,* 316 NLRB 353, 356 (1995), whether or not there is a collective-bargaining agreement incorporating a grievance procedure. *Beverly California Corporation f/k/a Beverly Enterprises,* 310 NLRB 222 (1993); and *Storall Mfg. Co.,* 275 NLRB 220, 221 (1985), enfd. 786 F.2d 1169 (8th Cir. 1986). A pattern of conduct that frustrates the intended operation of the grievance procedure violates this obligation. Indeed, the Board has held that the circumstances justifying a refusal to meet with particular representatives are quite restricted. *Missouri Portland Cement Company,* 284 NLRB 432 (1987). No such circumstances exist in the instant case, and Respondent has alleged none. See also, *In re Contract Carriers Corp.,* 2003 WL 21778795.

By engaging in the conduct described above, I find that Respondent was refusing to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act.

Respondent Refused to Recognize the Union

Between the time that Jennik proposed numerous dates to Respondent on which to reconvene bargaining, and before bargaining resumed in and after August 2002, Respondent refused to recognize the Union. In this regard, Portnoy sent a letter to Jennik, dated June 13, 2002, which concluded: "With all of your harassment, you have yet to establish that [the Union] represents a majority of the employees." However, Respondent had already recognized the Union as the exclusive bargaining representative of the Unit no later than August 29, 2001 when it implemented its contract proposals effective at the start of the school year, September 4, 2001. Portnoy had sent the June 13 letter to criticize the copies of authorization card that the Union had provided to him to ease any lingering concern Respondent may have had that it represented its employees at the New Canaan facility.

However, although these Union cards were signed by current employees of Respondent, the dates of such signing occurred when they were employees of the predecessor employer, Suburban at a time that the Union represented Suburban's employees. Because of that, Portnoy claimed that the cards were invalid to demonstrate the Union's majority support, in an apparent misunderstanding of the Board law with regard to successor employer. By claiming that the Union must prove its majority status among the employees in the Unit, after having already recognized the Union, I find Respondent violated Section 8(a)(5) of the Act.

By Portnoy so claiming that the Union did not represent a majority of the employees in the Unit, at a time that Respondent had already recognized the Union as the exclusive bargaining representative of the Unit, Respondent refused to recognize the Union as the exclusive representative of the Unit for the purposes of collective-bargaining in violation of Section 8(a)(1) & (5) of the Act. *Raley's* 336 NLRB 1 (2001); *St. Elizabeth's Manor*, 329 NLRB

341 (1999); *Nantucket Fish Company,* supra*, Jerr-Dan Corp.* 237 NLRB 302, 303, (1978), enfd. 601 F.2d 575 (3d Cir. 1979); *Research Management Corp.,* 320 NLRB 627, 643 (1991); and *Green Briar Nursing Home,* 201 NLRB 503 (1973).

Accordingly, I conclude that Respondent, by taking such position was refusing to recognize the Union in violation of Section 8(a)(1) and (5) of the Act.

The Section 8(a)(1) Allegations

Discriminatory Solicitation/Distribution Rule

José Umana was hired in June 2001 by Respondent as a driver.

In about March 2002, Umana spoke to Joe Iovino, a Union Staff Representative, while at the New Canaan facility, at the regular monthly Union meeting. Iovino told him that he wanted a unit employee to solicit employees to sign Union membership/authorization cards at the Respondent's New Canaan facility, and Umana agreed to do so. Thereafter, Umana spoke to about 40-45 co-workers, of which 34-38 signed cards for the Union. All of the Union activity occurred during a one-week period in the latter part of March 2002. Umana passed out these cards to employees at the end of his runs, as his co-workers either arrived or left the New Canaan facility. The location of the solicitations was at the entrance to the parking lot dedicated to parking for Respondent's buses, and at a point where it abutted the school parking lot. Umana also passed out Union literature, which discussed the contract proposals that the Union intended to make to Respondent when negotiations on a successor agreement resumed.

On occasion, Umana may have offered a Union card to an employee who had no interest in the Union. In some instances, he admitted that he talked loudly, and in one instance involving a co-worker, Tommy Bolt, he and Bolt raised their voices. There is no evidence that he threatened any co-worker when talking about the Union.

In March 2002, one of Respondent's drivers, Luis Horvath, an admitted anti-Union employee, told Terminal Manager, Debbie Casavecchia about Umana's efforts to get employees to sign union authorization cards, and asked her how he could get rid of the Union. Horvath admitted that Casavecchia said that he should call the National Labor Relations Board.

Sometime in April 2002, Horvath solicited signatures from co-workers and a flyer which stated: "Sign below to vote no to the Union even if you were misled, and already signed the green Union card. Please return to the office." Horvath testified these flyers were given to him by Maribel Antia, Respondent's dispatcher, and an admitted supervisor within the meaning of Section 2(11) of the Act. These flyers were stored on Antia's desk. [6]

The evidence also established that Antia was aware that Horvath was asking employees to sign copies of an anti-Union flyer, as she not only overheard him doing so in the office trailer, but she actually observed employees signing copies of the anti-Union flyer. In fact, Horvath admitted that he often solicited employee signatures on copies of the anti-Union flyer in the

[6] I find that Horvath was an incredible witness. His testimony during cross-examination was vague and evasive. His testimony that he prepared the flyers and the decertification petitions is not believable given the legal craftsmanship. His overall demeanor was very unfavorable. Thus I discredit his entire testimony except where he makes admissions against Respondent's interest.

dispatch area of the office trailer, in the presence of Casavecchia and Antia.

The credible evidence establishes that Respondent prepared and encouraged Horvath to distribute anti-Union flyers which were distributed to unit employees with Respondent's knowledge. Accordingly, I find such conduct was a clear violation of Section of 8(a)(1) of the Act.

Discriminatory Solicitation of Literature and Decertification Petition

In Spring 2002 Maribel Antia, Respondent's dispatcher asked Cynthia Inabinett, a unit driver to sign a sheet of paper as she entered the office trailer prior to her morning school bus run. [7] Upon being handed that sheet of paper described below, Inabinett asked Antia what was her purpose in giving it to her. Antia responded that they were trying to keep the Union out. Throughout this verbal exchange between Inabinett and Antia, Respondent's Terminal Manager, Debbie Casavecchia, was within two to three feet from where Inabinett was standing. The sheet states as follows:

TO ALL NEW CANAAN BUS DRIVERS

VOTE <u>NO</u> TO UNION REPRESENTATION11
WHY?

WHO'S PUSHING FOR THIS UNION?

THOSE WHO HAVE NOT HAD ANY PREVIOUS EXPERIENCE WITH THIS SAME UNION? THOSE WHO THINK THEY WILL GET UNION REPRESENTATION BECAUSE OF TROUBLE BROUGHT ON MY THEMSELVES.

WHY WAS THIS SAME UNION VOTED OUT OF THE TOWN OF GREENWICH?

PROMISES MADE NOT FULFILLED.
CALL THE GREENWICH BUS CO. YOURSELF IN ORDER TO FIND OUT INFORMATION REGARDING THIS UNION. PHONE # 861-2222 OR 352-1784.

THINK! WHILE MAJOR COMPANIES ARE CUTTING BACK FOR FULL TIME WORKERS, WHY WOULD WE, BUS DRIVERS, WHO ALL WORK PART TIME, EXPECT 100% PAYMENT FOR BENEFITS?

<u>PAY FOR 35 HOURS GUARANTEED?</u>

IF THERE IS NOT ENOUGH WORK FOR EVERYONE TO MAKE 35 HOURS A WEEK, HOW COULD WE GET PAID FOR HOURS NOT WORKED?

[7] I credit Inabinett's testimony. In this regard she was responsive to questions put to her on direct and cross-examination. Her testimony was detailed and I was impressed with her overall demeanor.

FEES?

IT'S POSSIBLE THAT UNION DUES COULD BE DOUBLED IN ORDER TO MAKE UP FOR THIS PAST YEAR.

FOR THOSE OF US WHO HAVE WORKED FOR OTHER BUS COMPANIES KNOW AND APPRECIATE THAT THE BAUMANN BUS CO. HAS BEEN VERY FAIR WITH US. WHY JEOPARDIZE OUR RELATIONSHIP WITH THEM?

REMEMBER THE LIST OF THE CONTRACT DEMANDS ARE ONLY SOMEONE'S DREAM NOT THE FINAL CONTRACT.

FOR THOSE OF YOU WHO HAVE BEEN MISLED TO THINK THIS IS GOING TO CONTRACT, IT ONLY BECOMES A CONTRACT WHEN ALL PARTIES SIGN AND THE COMPANY AGREES TO ALL ITS DEMANDS.
IF THE DEMANDS ARE UNREASONABLE, WHAT COMPANY WOULD AGREE TO THEM?
SIGN BELOW TO VOTE NO TO THE UNION, EVEN IF YOU WERE MISLED AND ALREADY SIGNED THE GREEN CARD. PLEASE RETURN TO OFFICE.

SIGN HERE _____

Inabinett credibly testified that she did not sign the sheet when it was initially given to her by Antia. Instead, she took it with her and completed her morning school bus runs. Upon doing so, Inabinett returned to the New Canaan facility at about 9:15 a.m., at which time she signed it. Inabinett then returned to the office trailer and returned that sheet to Antia. When she did, Antia said, "Oh good, you signed the paper." Antia then proceeded to show Inabinett similar papers that she claimed to have been signed by other drivers, and said, "It's a good thing [that you signed] because the Union wasn't going to do anything for us." Antia then said that Respondent was good to its employees, and gave examples of that bounty. Antia reminded Inabinett that, even though drivers returned to the New Canaan facility at 9:15 a.m. after their morning runs as had Inabinett that same day, Respondent paid them until 9:30 a.m., and provided them with clean buses. In addition, Antia told Inabinett that Respondent intended to provide the drivers with new shirts and coats.

In that same conversation, Inabinett credibly testified that Antia told her that if the employees got a Union at the New Canaan facility, it would not get them a raise or benefits, but would require employees to pay dues back to the time they were hired. In addition, Antia told Inabinett that the benefits that she just described would be taken away from employees with a Union.

When Inabinett asked Antia why no driver that she knew was signing the sheet that she just did, and "why everybody as far as she could tell wants the Union." Casavecchia, who passed about two to three feet from Inabinett en route to her office in that trailer, responded to Inabinett's question by saying, "Because they're all idiots, because they're all idiots".

On or about May 3, 2002, Horvath attempted to file a decertification petition with the Board's Regional office. That petition was not docketed and Horvath was advised by the

Regional office that "the petition had been submitted a day too late" and that it could be re-filed "after June 30, 2002, when the prior Union contract covering the New Canaan drivers expired."

On July 1, 2002, Horvath filed a second decertification petition. On that petition, Horvath initially inserted his name as the "Employer Representative to contact" as he had on the first decertification petition.

Horvath obtained employee signatures on the accompanying showing of interest on June 20, 2002, the last day of the 2001-2002 school year. Horvath obtained those signatures at various locations at the New Canaan facility, including the drivers' trailer, in the buses and in the bus yard and the dispatcher's area in the office trailer. In fact, Horvath testified that the dispatcher's area was the only place he could find drivers to sign the decertification petition. Casavecchia was aware of Horvath's conduct in this regard as "she walked into the driver's trailer on several occasions" during the time that he was soliciting those signatures, and even observed employees signing the showing of interest. Indeed, Horvath believed that Casavecchia was aware of what he was doing and made no effort to hide the fact that he was circulating a decertification petition even though Casavecchia frequently entered the driver's trailer during the course of the day. In light of the allegations of the Consolidated Complaint herein, the Region dismissed Horvath's decertification petition.

Of one thing, I am absolutely certain, the composition of the flyer described above and access to the Board's process to file the decertification petitions, and the decertification petitions themselves, required the skill of an experienced labor relations consultant, or attorney. In this regard, see, *Acme Bus Corp.,* 320 NLRB 458 (1995), in which the respondent therein was admittedly comprised of Respondent and other related family owned bus companies, including Brookset Bus Corp., all located at the same address as Respondent, and represented by the same labor relations consulting firm as Respondent herein. That case, in which the Board adopted the decision of the Administrative Law Judge, involved, *inter alia*, a union organizing campaign, which the Respondent therein vigorously opposed, under the guidance of Murray Portnoy. As noted by the Administrative Law Judge in that case, at footnote 4, Murray Portnoy was "associated with the firm of Portnoy, Messinger, Pearl & Associates, which represented Respondent in the investigation and hearing of this case, and the related representation case," and as "labor consultant" of Respondent therein, was found by the judge to be an agent of the Respondent within the meaning of Section 2(13) of the Act. In addition, as found by the judge in that case, at page 460, Portnoy directed the company's dispatchers to identify unit employees who were "strictly company people", determine what benefits they "really" wanted, and bring them to the next company meeting of employees, at which Portnoy and Respondent's owner, Ronald Baumann addressed employee concerns.

I conclude that Horvath lacked the skill and knowledge to draw up the flyer and file the petitions. Rather, I conclude that a person skilled in labor relations drew up the flyer and told Horvath how to get the Petition signed and how to file it with the National Labor Relations Board. Given the same employers, as in *Acme,* the same labor relations consultant, and the same course of conduct, I find, Portnoy is an agent of Respondent and that the flyer was drawn up by Portnoy and Respondent's supervisors were told by Portnoy what instructions should be given to Horvath concerning obtaining the required showing of interest and how to file the petitions. I find Portnoy to be an agent of Respondent. I also find by the conduct described above that Respondent violated Section 8(a)(1) of the Act.

Respondent Threatened Employees With Discipline and Loss of Benefits if they Supported the Union in Violation of Section 8(a)(1) of the Act.

As more fully described above, during a conversation a few hours after the one in which Respondent's dispatcher, Antia, asked Inabinett to sign the anti-Union flyer and in which Inabinett returned that flyer signed, Antia reminded her of some of the benefits that Respondent provided to its employees, including being paid until 9:30 am, even though they may return from their morning run at 9:15 am, as Inabinett did that same day, as well as providing drivers with clean buses. In addition, Antia also told Inabinett that Respondent intended to provide the drivers with new shirts and coats. More significantly, Antia told Inabinett that, if the employees got a Union at the New Canaan facility, it would not get them a raise of benefits, while at the same time it would require employees to pay dues back to the time they were hired, and that the benefits that she just described would be taken away from employees if they got a Union.

Although Antia did not tell Inabinett who would take those benefits away, the clear implication of that statement, in the context of what Antia, an admitted agent of Respondent, had just told her, was clear: it would be Respondent who would, using the "iron fist" inside its "velvet glove" take away those benefits, if the employees obtained or otherwise supported the Union. This conclusion becomes more obvious when viewed in light of the fact that Casavecchia was close-by, if not present, when Antia told Inabinett of the consequences of supporting the Union. Indeed, as Casavecchia passed within two to three feet from Inabinett while still in the office trailer, called employees who supported the Union, "idiots." The Board has long found such threats of loss of benefits to violate Section 8(a)(1) of the Act. See, *Reno Hilton Hotel,* 319 NLRB 1154, 1155, (1995); *Ohmite Manufacturing Company,* 217 NLRB 435 (1975); *Liberty Mutual Insurance Co*., 194 NLRB 1043 (1972).

Accordingly, I find the threats described above to be violative of Section 8(a)(1) of the Act.

Poisella's Letter

Respondent's Director of Human Resources, Jim Poisella, sent a letter to Union organizer Russell Smith, dated June 20, 3003, protesting the conduct of employees "sympathetic to the Union," who were distributing Union authorization cards and other Union related literature. He then threatened the Union with legal action. In that letter, Poisella stated, *inter alia*, that it was being posted at the New Canaan facility, and that employees were being invited thereby to report to Respondent any similar actions by employees in the future, which they considered in their unfettered judgment, to constitute harassment. I find in effect, Poisella was asking employees to report any future instances in which employees who were Union supporters, or even thought to be Union supporters, and were engaged in protected activity, like soliciting Union cards or other Union literature, to Respondent representatives. Since there is no evidence that any employee, other than Umana, solicited Respondent's employees to sign Union authorization cards or passed out related Union literature. I conclude Poisella's letter can only be interpreted as a request that Respondent's employees keep him informed of Umana's Union activities, and the activities of other employees who might engage in Union protected activities, and an implied threat to the Union of legal action.

It is well established that employee's right to engage in conduct protected by Section 7 at work is protected by the Act. *Republic Aviation Corp. v. National Labor Relations Board.* 324 U.S. 793, 795-804 (1945). The Board has long held that, in the absence of "special circumstances," an employer's prohibition of, or limitation on such employee conduct violates Section 8(a)(1). *Ohio Masonic Home*, 205 NLRB 357, 357 (9173), enfd. mem. 511 F.2d 527

(6th Cir. 1975). In cases where the employer argues that special circumstances justify a limitation on Section 7 activity, the Board and courts balance the employee's right to engage in Union activities against the employer's right to maintain discipline or to achieve other legitimate business objectives, under the existing circumstances. *Standard Oil*, 168 NLRB 153, 161, citing *Fabri-Tek, Inc.*, 148 NLRB 1623 (1964), enfd. denied 352 F.2d 577 (8th Cir. 1965).

As set forth above, I have discredited Horvath's entire testimony. Therefore I find that Respondent has failed to establish that such "special circumstances" existed. Accordingly, I find that Respondent threatened its employees with discipline if they distributed Union cards, literature, or engaged in other protected activities, in violation of Section 8(a)(1) of the Act. I also find that Respondent impliedly requested its employees to report to it, the Union activities of its employees, in violation of Section 8(a)(1) of the Act.

Threats Of, and Actual, Discipline for Engaging In Union Activity

During the week of June 11, 2002, Respondent posted a notice to employees in the driver's room whereby it requested that those drivers who were interested in summer work and/or intended to return the following school year, to so indicate opposite their respective names. Umana testified he indicated on this notice an interest in both by making a check in appropriate columns. Two days later he noted that those notations had been erased, and replaced with the notation "No" for both questions. Umana then put the following notation on that sign-up sheet: "whoever erased my name and the returning check mark, please come see me, talk to me."

On that same day, Umana testified that Casavecchia called him into her office trailer and told him that "no one is allowed to write anything (on) official office papers that are put (up) on the (drivers) trailer." This was an obvious reference to the sign up sheet. Umana incredibly testified that Casavecchia then told him "anybody writing or messing with office papers, will be disciplined or terminated" and went on to say that she had five persons willing to testify that Umana was trying to get her fired and that she was taking it "very personal." Umana responded that there was nothing personal about his actions, and that he was an active Union member. Casavecchia responded by saying, "lets see if the Union is going to come and help you out." Umana's testimony was the sole basis for the threats alleged. Since I have totally discredited Umana's testimony, except when he makes admission, and I have concluded that Casavecchia is a credible witness, I conclude General Counsel has failed to establish the violation alleged.

Denial of Access

Respondent's trailers, the office trailer, and the drivers' trailer, are parked in a parking lot which is under sole control of the New Canaan School District.

The School District had always given the Union free access to meet with employees and post notices. This practice started in the mid 90's with Suburban, the predecessor employer, and it continued in the same manner when Respondent took over the operation in September 2001, until May 2002. Thereafter Union officials were denied access to the drivers' trailer.

The testimony of the two New Canaan School District officials, Michael Lagas and Larry Cerretani, called by General Counsel, conclusively established that it was the District officials who denied access to the Union officials to visit the drivers' trailer located at the New Canaan School property. They testified that they did this because the Union officials had fraudulently misrepresented themselves to the School District officials in attempting to have access to a school district conference room in the high school. The District representatives credibly testified

that in light of the security concerns, dangers and difficulties in protecting students at its schools, the District's approach was that the Union who fraudulently misrepresented themselves to the District did not have the right to use the District's facilities. The Union presented no witnesses to contest or otherwise dispute the testimony of the District employees.

The unequivocal testimony is that it was the decision of the School District and the School District alone, unaided or unadvised by Respondent, to exclude access to the Union. There was no evidence presented by General Counsel that Respondent did anything to exclude access to Union officials to the facility. It is also unequivocally clear that Union access was ultimately granted to the area, after the Union settled its differences with the School District officials and Respondent did not interfere with that access.

Counsel for General Counsel contends that Casavecchia contacted the School District officials and asked them to deny the Union access to the drivers' trailer, General Counsel submitted no evidence to support this contention.

Accordingly, I conclude there is no evidence to support this complaint allegation.

Additionally, the Supreme Court has held that by its terms the NLRA only confers rights on employees "and not on unions or their non-employee organizers." *Lechmere, Inc. v. National Labor Relations Board,* 502 U.S. 527, 532 (1992). In *Lechmere* the Court held that an employer cannot be compelled to allow non-employee organizers on its property unless there is absolutely no other means to access the employees. *Id.* at 533-34. Here, it is undisputed that the access was denied to non-employees, not employees, there *Lechmere* controls no matter who denied the organizers access to the property.

Discrimination

In *Wright Line, a Division of Wright Line, Inc.,* 251 NLRLB 1083 (1998), the Board set forth the causation test to be used in all cases alleging discrimination in violation of Section 8(a)(1) and (3) of the Act. Under *Wright Line,* the General Counsel must make out a prima facie showing that protected conduct was a motivating factor in the employer's decision. The burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The *Wright Line* analysis also applies where the employer's purported reasons for the discriminatory act are pretextual in nature. *Jefferson Electric Co.,* 271 NLRB 1089 (1984); *Grady Delling d/b/a Country Boy Markets,* 287 NLRB 234 (1987). The Board looks to a variety of factors to determine whether an employer's conduct is motivated by protected conduct such as union activities or participation in Board processes. Paramount among such factors is employer animus towards protected activities and the timing of the disputed conduct in relation to protected activities. *Taylor & Gaskin, Inc.,* 277 NLRB 563, 564 fn.2 (1985); *The Bond Press, Inc.* 254 NLRB 1227, 1231 fn.1 (1981).

The fundamental inquiry is one of motivation, the state of mind of the employer's decision-maker. *Wright Line, supra.* Illegal motive has also been found supportable by a number of factors which make up the General Counsel's prima facie case, such as employer knowledge of the employee's union animus. Illegal motive has also been found supportable where an employer presents false and shifting reasons to explain its conduct. *Master Security Servs.,* 270 NLRB 543, 552 (1984). Once the prima facie showing is made, the employer may rebut the prima facie case by persuading the Board that it would have still either changed the terms and conditions of employment or disciplined the employee even absent his/her union activity. The Employer, however cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken

place even in the absence of the protected conduct. If the Board rejects the employer's reasons as pretextual, a violation of the Act may be found.

Alleged Discrimination Against José Umana

With respect to the credibility of Umana, I conclude his testimony is generally not credible. In this regard, his entire testimony is consistently confusing, vague, and inconsistent. His demeanor was extremely argumentive, and evasive, and confrontational. Accordingly, I discredit his testimony except for admissions against interest.

On or about March 13, 2002, Umana attended a Union meeting held at the drivers' trailer on the premises of New Canaan High School. During the course of the March 2002 meeting, Umana volunteered to be a shop steward at the request of Union Representative Iovino. He did so because of the depth of support for the Union amongst his co-workers that he experienced at that Union meeting.

By letter dated May 8, 2002, Union Organizer Russell Smith, *inter alia*, advised Respondent's director of Human Relations, James J. Poisella, that Umana, together with two other employees, Cynthia Inabinett and Thomas Moore, constituted the employee Union committee at the New Canaan facility. Thereafter, Smith and Iovino underscored Umana's role as the primary Union supporter in a letter to Poisella dated June 25, 2002, in which he advised him that Umana had agreed to become acting Union Chairman, and shop steward, at the New Canaan facility and requested that Umana's position be respected in lieu of the contract provisions that normally govern the duties of shop steward as a representative of the Union.

Alleged Reduction of Hours

Umana began driving regular runs on about October 8, 2001, after completing his training period and obtained a CDL drivers' license. Starting that second week of October 2001, Umana was consistently assigned 37 hours of driving per week until the end of March 2002, with the exception of any school vacations that occurred during that period. The documentary evidence submitted by General Counsel was a single payroll sheet for February 2002 and one time sheet for June 2002. However, Umana's testimony, the precise details concerning how his hours were reduced is very vague and imprecise. General Counsel's evidence appears to rely upon a payroll comparison between February and June. In this regard Umana testified: "My hours were reduced 16 hours per week…around June"

What is clear in the overall record, is the obvious explanation for why Umana's hours were reduced. The school for which he drove a bus was not open in June, and therefore he lost those 16 hours per week. During cross-examination Umana admitted that he did a.m. and P.M. runs for the private school, and a midday run for the public school. He also admitted the public and private schools have different school schedules. For example, in April it is undisputed that the private school takes a spring break at a different time than the public school. During these weeks, the amount of hours and pay Umana would get, would vary because on certain days and weeks one or the other school would be closed. He was not paid for a run at the private school when the private school is closed. Likewise, he was not paid for a run at the public school when he does not have to do the public school run.

The evidence conclusively establishes this practice applied to all employees. There was no evidence presented that Umana was singled out for any individual treatment, notwithstanding his Union activity, or actually had his hours changed. His schedule included the same runs throughout the year. There was no evidence that these runs ever changed nor was there any

evidence that his hours changed. It is just that the complete run is not required everyday.

In June, the Country Day School ended almost two weeks before the public school. Therefore, Mr. Umana who had most of his runs at private schools, had less hours in the last couple of weeks in June because all he was doing was a single public school run. In June his hours dropped from 37 hours a week to 16 hours a week . On cross-examination, Umana admitted that the early school closing did, in fact, occur. The evidence further established that all other drivers with similar runs were equally impacted. General Counsel presented no evidence that the closing of the Country Day School for the year had anything to do with his union activities, or evidence that the closing of the private school related to the union activities of any bus drivers.

Counsel for General Counsel contends that had Respondent produced payroll sheets for March, April and May, such payrolls would have established the alleged reduction from March through June. However, General Counsel failed to produce such payroll sheets, or subpoena them. Moreover, the hours did fluctuate during the Spring period, and I conclude that had the payroll been introduced, they would not have established any discrimination given Spring break periods.

Even if I were to find the Union animus toward Umana as contended by General Counsel and alleged throughout the complaint, I would still dismiss the allegation that his hours were discrimatorily reduced, based upon General Counsel's documentary evidence and Umana's admission, described above. I find General Counsel did not meet its *Wright Line* burden.

I conclude there is no evidence to support this allegation and further conclude that Respondent did not violate Section 8(a)(1) and (3) as alleged.

Umana – Summer Camp

The Complaint also alleges that Respondent allegedly refused to offer 2002 summer camp runs to Umana because of his alleged Union activity. In this connection Umana signed a posted sheet that indicated general interest in summer camp runs and interest for the returning Fall year.

Debbie Casavecchia, Respondent supervisor, credibly testified that the general interest sheet was not a sign up for a specific camp or a specific camp run. It is used simply as a guide for Respondent to determine employee interest in potential summer runs and drivers who were interested in summer camp runs and were returning in the fall. Casavecchia testified in order to be picked for a specific camp run, the procedure always was that the employee signs up on the posted notice for each specific run. These posted notices contain details of the time and days for each camp and includes lines for employees who are interested to sign up.

Umana, on cross-examination admitted that he did not sign up for any specific camp run. Moreover, the evidence shows that several other employees who were openly involved in union activities, including Thomas Moore, and Josette Conte Daniels, did sign up, and were offered camp runs. Casavecchia's credible testimony establishes that with respect to summer camp and other types of additional runs, all involve specific sign-up sheets. This had been the practice at this yard for many years, prior to Respondent's taking over from its predecessor, and was not changed.

It is clear that the summer camp procedure exists because an employee can only effectively seek and bid for a run when the specifics of the run, the time and schedule is actually known. With respect to Umana, he did not express any interest in the actual summer camp runs since he did not sign up on any of the camp run sheets. In his testimony, all Umana stated was that Respondent said he may not get any work because of his low seniority. I conclude it is obvious that Respondent could not know who would be offered camp runs until employees signed up. Respondent contends no offer was made to Umana because he did not sign up for any of the summer camp sign up sheets. Other employees, including Union supporters, who signed up were given summer camp runs according to seniority.

Again, even if I were to find that the Union animus set forth in the complaint, I would still conclude General Counsel failed to establish its *Wright Line* burden. Accordingly, I find Respondent did not violate Section 8(a)(1) and (3) as alleged.

Alleged Discrimination Against José Umana Concerning Biding for School Runs in September, 2002

Job assignments at the New Canaan facility for many years during the Suburban tenure were done on the basis of seniority, including the assignment of runs to drivers at the start of the school year, a practice Respondent carried over when it took over operational control of the New Canaan facility. In this regard, although the runs for the new school year normally were posted from which drivers could pick according to seniority, returning drivers were typically able to reclaim the run that they had the preceding school year.

Prior to the start of the school year, drivers were sent letters or notified by drivers who also helped out in the office by telephone, instructing them to attend Respondent's general "kick-off" meeting, which was held at New Canaan High School about two weeks prior to the start of the 2002-03 school year. In addition to drivers, Respondent's Director of Human Resources, James Poisella, Terminal Manager Casavecchia, Safety Supervisor José Velez, as well as Larry Cerretani from the New Canaan Board of Education attended this kick-off meeting. The purpose of the meeting was to discuss driver safety, to give drivers time to get ready to start work, to go for their physical examinations, and get other information. Casavecchia credibly testified that she spoke to drivers at this meeting and told them they were to go to the office trailer to pick their routes for the coming school year, according to seniority. Following the meeting, drivers lined up outside the office trailer and waited to be called in according to seniority to pick out their routes.

The testimony of Umana concerning his alleged discrimination as to his fall run pick is extremely confusing, vague, contradictory, and unintelligible.

As best set forth in his incredible testimony, and in General Counsel's brief, Umana's testimony is that during the last week of the 2001 – 2002 school year, office manager Casavecchia gave each employee an Unemployment Notice, which, *inter alia,* advised them when they were to return to work for the following school year. Umana received such a Notice from Casavecchia on June 19, 2002. At the top of the Notice was the statement, "INSTRUCTIONS TO EMPLOYER." Among those instructions was one which required that the Notice was to be given to the employee at the time of separation; an additional instruction was that the Notice was not to be sent to the Department of Labor. The last of these instructions to the employer was one in capital letters, which stated:

"PLEASE BE SURE THAT ALL THE INFORMATION ENTERED BELOW IS CORRECT."

Among the Sections to be completed by Respondent on the Notice was *"Section 1- Return To Work Date (**if definite**)"* [emphasis supplied]. In the box provided for that date, Casavecchia wrote: "9.9.02" on the form given to Umana, and the other employees. Although Casavecchia may not have told Umana that his return date was September 9, 2002, she didn't have to. The Unemployment Notice completed by her and handed to him made it clear that he was expected to return to work on that date. Indeed, as noted above, Respondent was to complete the "Return to Work Date" Section of that Notice only "*if definite* (emphasis supplied)."

Allegedly relying on that form, Umana concluded that he was to return to the New Canaan facility on September 9, 2002, and did not inquire further regarding his return date during the summer, as he knew when Respondent expected him back on September 9. Although he received a letter from Respondent, about a month after being laid off, asking that he confirm his intent to return to work for the new school year, nothing in that letter advised him of a return date different than that given to him by Casavecchia on June 21st, which was September 9.

During the summer, Umana incredibly testified that he got a voice mail message from Samuel Hernandez, a unit driver who worked in the office assisting Casavecchia, in which he was told that he was to return to work in October and that he needed to get a physical in order to return to work. He assumed the October date was incorrect and ignored it. However, Umana testified that Hernandez did not tell him where he was to get that physical.

Umana testified he assumed that he was to go to the Tully Emergency Center in Stamford, CT, the facility that Respondent had sent him to for his initial physical examination prior to being hired.

On September 6th, Umana testified that he went to the Tully Emergency Center for a physical and learned for the first time that physicals for Respondent's employees were being given at the New Canaan High School. Umana then went to New Canaan High School that same day. Umana testified that he did not call Respondent to inquire about the location for driver physicals, as he assumed, that if they were to be given at a facility other than the Tully Emergency Center, Respondent would have notified him. Counsel for General Counsel contends he alone was not notified where to go for his physical because Respondent wanted to set him up. However, all other employees knew where to go that day, Umana found out where to get his physical, and got it.

On the September 7, Umana went to the New Canaan facility and having heard nothing from Respondent regarding the date he was to pick his runs, and having no notice from Respondent as to his reporting date, other than the Notice given to him on June 21, 2001, September 9. He spoke to Casavecchia, who told him that there was only one package of runs available, with two runs in the morning and one in the afternoon. Umana then told Casavecchia that he would only take the morning runs, as he could make more money working in the afternoon. Casavecchia then offered him a package which included three morning runs. Umana accepted this package and chose these runs without incident.

Counsel for General Counsel alleges in his brief that: "This second pick, which Casavecchia had initially withheld from Umana was a better package than that originally offered to him…"

I conclude that all of the evidence elicited by Counsel for General Counsel as set forth above is totally irrelevant, except for the September 7 conversation between Umana and Casavecchia.

It is absolutely clear that there is no discrimination. Umana got the run he wanted. The initial offer was rejected by him, because it required afternoon runs. When he for the first time told Casavecchia that he wanted only morning runs, she offered him a great package that was entirely acceptable to him.

Accordingly, I conclude there was no discrimination, and that General Counsel has absolutely failed to meet its *Wright Line Burden*, and find no violation of Section 8(a)(1) and (3) of the Act as alleged.

The Suspension of Umana

As part of a driver being assigned a regular run to drive students to and from school, they are given Trip Details, also known as "trip sheets." These trips sheets are generated by "Transfinder," a computer software program provided by the New Canaan Board of Education to Respondent and the predecessor companies. The trip sheets are given to drivers as part of their run packets and are used by drivers in driving their respective runs. They provide explicit, detailed instructions how they should drive their assigned routes, complete with enumerated stops that a driver is to make in doing the run. These instructions include the precise time that a driver is to be at each stop, its street address, driving instructions as to how to get from one stop to another, as well as the names of the students to be picked up at each stop. These trip sheets can be updated as needed, when stops are added or deleted because of new students and/or students no longer using the bus for whatever reason. Such updates can be and are normally done by imputing these changes into the Transfinder program, and a corrected trip sheet is prepared for the driver. On occasion updates are made by hand by Casavecchia.

At some point in time, a new stop was assigned to Umana's route, called the Bayberry Road stop. Instructions were added to Umana's trip sheet as follows: *"(From Wahackme & Chichester Rd), (turn) Left (onto) Bayberry Road, to 31 Bayberry Road, Return (turn) Right (onto) Wahackme Road, (then) Left (onto) Dogwood Lane."* From there, Umana was to follow the instructions on the pre-printed trip sheet.

State law, the School District's procedures, and both Respondent's and predecessor's procedures provide that the school bus cannot back up in making a turn, especially on residential streets because it is dangerous to safety of the children and passengers, can cause damage to residential property, and the backing system of the bus makes a loud noise, which can prove disturbing to residents.

Umana testified, he made his stop at Bayberry Road, which was the 15th stop on his route, and he was unsure how to proceed to his next stop. Although there was a telephone in his bus with a direct line to the dispatchers office, where instructions could have been provided, he did not phone for instructions. He could have also continued on Bayberry Road, a short distance and turned around a cul-de-sac and continued his run smoothly. He did neither. Rather, he backed up his bus and made a u-turn on a residential street, and backed up into a resident's driveway.

When Umana finished his run, he failed to report the problem, and to get instructions on how to avoid it. Had he done so, he would undoubtedly been told about the cul-de-sac, a short distance from the stop. Instead, Umana continued his back up U-turn procedures for the next three days. At some point in time, a resident complained to the School District that the bus driver handling the Bayberry route was backing the bus into her driveway while making a U-turn. The School District complained to Respondent, and on the fourth day, Respondent sent out its safety inspector to investigate what was happening. The safety inspector, José Velez, observed

Umana making another illegal U-turn.

When Umana returned to Respondents facility that day, Velez asked Umana to sign a warning concerning his illegal procedures, and accept a short, two day retraining period. Umana refused to sign the warning, and accept the retraining. Shortly thereafter, he was suspended for three days. Thereafter, he returned to work. He was still working for Respondent as of the day of this trial.

Counsel for General Counsel argues that Casavecchia set up Umana by intentionally neglecting to include a specific instruction as to the cul-de-sac. Such argument, is a stretch in ones imagination. It requires that Casavecchia knew that Umana would not use the telephone to call in, knew Umana would not drive the short distance to the cul-de-sac, and that he would illegally back up his bus, and know that a resident would complain, giving Respondent an excuse to discipline him. I simply reject such argument. Nor does Counsel for General Counsel take into account Umana's failure to report his problem for 4 consecutive days so that he could have received instructions as to the cul-de-sac.

Even assuming Respondent's Union animus, I conclude General Counsel did not meet its *Wright Line* burden and did not violate Section 8(a)(1) and (3) as alleged.

Alleged Discrimination of Uta Gonet

Drivers are required to "pre-trip" their buses prior to each and every use, including mid-day runs. These daily pre-trips, as described by Respondent's safety supervisor, José Velez, were very detailed and involved a complete inspection of a bus.

All drivers were required to report to Respondent's New Canaan facility at the same time regardless which school they were assigned to pick-up students, at least during Velez' tenure of approximately late November 2001 to late December 2002. This 'report time' was to allow drivers 15 minutes to perform their pre-trips, and to ensure that they arrived at their assigned schools on time.

Counsel for General Counsel contends that the predecessors starting time was 2:15 P.M. Respondent admits that all employees were notified by a written memo of a report time of 2:30 PM. Gonet testified that the employees were being paid from 2:30 PM, but many of them reported at 2:15, in order to complete their "pre-trip". Thus I find that the new reporting time was 2:30 PM, but if employees felt they needed extra time to pre-trip they came at 2:15 P.M. [8]

Gonet testified she did not get the memo that Respondent contends all employees received. Instead she was told of her report time by Casavecchia.

Gonet thereafter testified that in trying to comply with Casavecchia's instruction, she found herself between the proverbial "rock and a hard place," because reporting at 2:30 P.M., prevented her from properly completing her pre-trip safety check, and then reporting to the Country School to pick up the kindergarten children of her assigned route on time. As a consequence, Gonet reverted to a 2:15 P.M. report time.

Thus the evidence clearly establishes that the starting time for all employees was 2:30 P.M. and that those employees who felt they needed more time to pre-trip came in earlier.

[8] This change in time is not being alleged by General Counsel as a unilateral change.

I find that whatever the alleged overall Union animus was or any alleged specific animus directed toward Gonet, she was treated exactly the same as all the drivers. I further find that General Counsel has failed to meet its *Wright Line* burden, and conclude that Respondent did not violate Section 8(a)(1) and (3) of the Act as alleged.

Josette Conte-Daniels' Denial of Non-Revenue Work

Non-Revenue work is defined work other then driving school runs. It includes office work, or other work in and around Respondent's facility.

The evidence established that Conte-Daniels was a senior employee, having worked as a driver for the predecessor employer for over five years. She was considered as a good worker. When Respondent began its operation of the New Canaan facility, Conte-Daniels was an outspoken anti-Union employee. In fact, she frequently voiced her anti-Union sentiments to Casavecchia. Sometime in April, 2002, she switched her position in favor of the Union. She was thereafter an outspoken pro-Union employee and became a member of the Union's negotiating committee.

Therefore, I conclude that there is absolutely no evidence to support any discriminatory conduct before April 2002. To the extent General Counsel contends otherwise, I conclude that such contentions are without merit, and dismiss such allegations.

By way of background, the credible testimony of Casavecchia, and Respondent's documents and Conte-Daniels admissions establish the following findings of fact. [9]

The credible evidence established that Respondent offered Conte-Daniels non-revenue work, including office work, during the fall of 2001, at the time when it was starting up its operations and there was a need for additional office persons. One employee, Eleanore Price worked full time in the office and from time to time Conte-Daniels assisted her. Later in the fall, that person left and another employee, Anita Maribel was hired. During this time Conte-Daniels continued to do both her school runs, and various non-revenue work; training, and office work. Specifically, the time records establish that through November and early December 2001, this non-revenue work did not occur everyday and was not always the same type of work. In mid December 2001, Anita Maribel went on maternity leave. At that point, Conte-Daniels did fill in for Maribel in the office on a regular basis. Maribel returned from maternity leave at the end of February 2002. Upon her return, Respondent did not need the extra office work Conte-Daniels was performing. In this regard, Conte-Daniels testimony establishes that in March 2002 her non-revenue office work decreased.

A review of Conte-Daniels time sheets in March 2002 established that while she did some level of non-revenue work it decreased for February. This pattern continued through the end of the year. Moreover, the evidence, including Conte-Daniel's testimony established the change, if one actually did occur, happened during the February – March 2002 time frame, at a time when Conte-Daniels was anti-Union. Thus, I conclude there was no reason to discriminate

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[9] I conclude that Casavecchia was a credible witness. I was impressed by her detailed and responsive testimony during both her direct and cross-examination. I was also impressed by her overall demeanor. In this regard she was forthright, not evasive nor argumentive. In contrast, I found Conte-Daniels to be evasive, argumentative and generally sullen during her entire cross-examination. Accordingly, I find that where her testimony in contradictory to that of Casavecchia, I credit Casavecchia.

against her prior to April 2002. Accordingly to this extent, I find General Counsel failed to meet its *Wright Line* burden.

Further, the credible testimony of Casavecchia also showed that as the year went on, non-revenue work outside of the office was rotated amongst all drivers. The evidence also established that non-revenue work was actually offered to Conte-Daniels but she turned it down. Non-revenue work continued to be distributed to all interested employees. The undisputed evidence establishes that Conte-Daniels took different school bus runs in 2002, and was not interested in or able to do non-revenue work.

Moreover, the credible and uncontradicted testimony of Casavecchia establishes that in the fall of 2002, driver Uta Gonet, a strong Union supporter broke her arm, and Respondent offered Gonet full time non-revenue work thereafter.

Thus, I conclude, based upon the credible testimony of Casavecchia, documentary evidence and Conte-Daniels' admissions, that even if it could be concluded General Counsel barely met its *Wright-Line* burden, the credible evidence clearly establishes without any doubt that Respondent met its *Wright-Line* burden. Accordingly, I conclude that with respect to allegations concerning non-revenue work, Respondent did not violate Section 8(a)(1) and (3) of the Act, as alleged.

Discriminatory Failure to Assign Conte-Daniels a Summer Camp Job

The evidence establishes that summer camp for bus driving jobs are posted for bidding according to the drivers seniority. It is not disputed that Conte-Daniels had very high seniority.

The camp runs for the summer of 2002 were posted by Respondent and included a camp run for the Long Hill Day Camp. Conte-Daniels put in a bid for this run. Respondent contends that it could not offer Conte-Daniels this specific run because the Long Hill Day Camp, in a letter to Respondent specifically requested a driver that got along with children and had a very calm disposition. The letter was without letterhead, and was unsigned.

There is no dispute that during the spring of 2003, Conte-Daniels had a heated argument with a parent on her school bus run. In view of the letter, Casavecchia credibly testified she determined Conte-Daniels would not be appropriate. Casavecchia told Conte-Daniels that she felt she was not qualified for the job because of this parent's spring complaint. However, Casavecchia offered Conte-Daniels a similar camp job in both time and hours. Conti-Daniels accepted the job. However, a few days later, she informed Respondent that she was refusing the run.

Counsel for General Counsel argued at the conclusion of this trial that the letter without the camp letterhead and unsigned, was fraudulent, and requested a postponement to investigate this matter. I denied the postponement, but agreed that following the close of the trial he could make a full and thorough investigation, and if he came up with evidence to support his contention, he could move to re-open this trial. General Counsel never made a motion to re-open. Therefore, I find the letter was authentic.

I find that Counsel for General Counsel barely met his *Wright-Line* burden. However, I conclude Respondent has overwhelmingly met his *Wright-Line* burden, and accordingly, find that Respondent has not violated Section 8(a)(1) and (3) of the Act as alleged.

Failure to Assign Conte-Daniels to a Fall 2002 Pick for a "Spare" Run

During the trial Counsel for General Counsel contended that Conte-Daniels was denied a "spare" run pick in the fall of 2002. On cross-examination Conte-Daniels admitted that she never asked for a "spare" run.

Accordingly, and without further discussion, I conclude General Counsel failed to meet its' *Wright-Line* burden and find Respondent did not violate Section 8(a)(1) and (3) as alleged.

Conclusions of Law

1. Respondent, is an employer, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Sections 8(a)(1) and (5) of the Act as set forth and described above, and in the recommended Order described below.

4. Pursuant to an executed collective-bargaining agreement between the Union and Respondent, the Union is the exclusive collective-bargaining representative for the following unit:

> All full-time and regular part-time operating employees of Respondent classified as drivers and monitors, and maintenance employees, including utility employees and cleaners-fuelers; but excluding officers, executives, superintendents. foremen, driver trainers, traffic checkers, inspectors, office employees, and all other supervisors as defined in the National Labor Relations Act, as amended.

Remedy

Having found Respondent has committed violations of Section 8(a)(1), and (5) of the Act, I shall recommend that it be Ordered to cease and desist, and take certain affirmative action to effectuate the policies of the Act.

I recommend Respondent be ordered to notify the Union of any proposed changes in mandatory subjects of bargaining and obtain the Union's consent before implementing such changes contained in the parties collective-bargaining agreement and bargain in good faith upon request by the Union. I further recommend that upon request by the Union, Respondent rescind the unilateral changes described above.

On the basis of the above findings of fact and conclusions of law and on the entire record, I issue the following recommended [10]

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, Baumann & Sons Buses Inc., it officers, agents, successors and assigns shall

1. Cease and desist from:

(a) Requesting its employees to sign anti-Union statements, decertification petitions, and/or requesting its employees to report to our representatives, the Union activities of unit employees.

(b) Threatening its employees with discipline or loss of benefits.

(c) Refusing to meet with the Union, upon request and bargain with it regarding wages, and other terms and conditions of employment.

(d) Discontinuing the payment of safety bonuses, changing rates of pay, implementing new procedures regarding posting, scheduling, or assigning of work without notifying the Union and giving it an opportunity to bargain about those changes.

(e) In any like, or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide information to the Union, upon request that is necessary and relevant for it in its role as the exclusive collective-bargaining representative of the unit consisting of:

> All full-time and regular part-time operating employees of Respondent classified as drivers and monitors, and maintenance employees, including utility employees and cleaners-fuelers; but excluding officers, executives, superintendents. foremen, driver trainers, traffic checkers, inspectors, office employees, and all other supervisors as defined in the National Labor Relations Act, as amended.

(b) On request by the Union, rescind the unilateral changes set forth and described above in this recommended ORDER.

(c) Notify the Union in advance of any proposed changes in mandatory subjects of bargaining, obtain the Union's consent before implementing changes to such subjects contained in the parties collective-bargaining agreement, and bargain collectively, and in good faith upon request by the Union.

(d) Within 14 days after service by the Region, post at its principal office and place of business located at the New Canaan Connecticut High School, copies of the attached notice marked "Appendix." [11] Copies of the notice, on forms provided by the Regional Director for

[11] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In any event Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2001.

(e) Within 21 days after service by the Region, file with the Regional Director or a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 23, 2004.

_____
HOWARD EDELMAN
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT request that you sign anti-Union statements and/or report to us the Union activities of other employees.

WE WILL NOT reduce your hours of work, fail to offer you work assignments or the opportunity to bid on jobs in accordance with your seniority, including non-revenue work, and/or change your report time, or discontinue work assignments because of your support for the Union.

WE WILL NOT warn, suspend, terminate or otherwise discipline you because of your support for the Union.

WE WILL NOT refuse to meet with the Union, upon request, and bargain with it regarding your wages, and other terms and conditions of your employment.

WE WILL NOT discontinue the payment of safety bonuses to you, change your rate of pay, or implement new procedures regarding the posting, scheduling, or assigning of work without first notifying the Union and giving it an opportunity to bargain about these changes.

WE WILL NOT in any similar way interfere with your rights under the law.

WE HAVE recognized the Union as the exclusive collective-bargaining representative of our employees in the following Unit:

All full-time and regular part-time operating employees of Respondent classified as drivers and monitors, and maintenance employees, including utility employees and cleaners-fuelers; but excluding officers, executives, superintendents, foremen, driver trainers, traffic checkers, inspectors, office employees, and all other supervisors as defined in the National Labor Relations Act, as amended.

WE WILL upon request by the Union, rescind the unilateral changes, set forth and described above, in this Appendix.

WE WILL notify the Union in advance of any proposed changes in mandatory subjects of

bargaining, obtain the Union's consent before implementing changes, and bargain collectively, and in good faith upon request by the Union.

WE WILL provide information to the Union on request that is necessary and relevant for it in its role as the exclusive collective-bargaining representative of our employees in the above Unit.

BAUMANN & SONS BUSES INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

280 Trumbull Street, 21st Floor, Hartford, CT 06103-3503

(860) 240-3002, Hours: 8:30 a.m. to 5 P.M.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (860) 240-3524.